

# CALCUTTA HIGH COURT

Commissioner of Income-Tax

Vs

Jitendra Nath Mallick

(G.K. Mitter J.)

07.03.1962

## JUDGMENT

### **G.K. Mitter J.**

1. In this reference the point of issue is whether a trust deed was executed by the assessee contains a provision for the retransfer directly or indirectly of the income or assets of the trust property to him or in any way gives him a right to reassume power directly or indirectly over the said income or assets. It was argued on behalf of the revenue that the trust deed contains more than one such provision by reason whereof the transfer of assets to the trustees can be said to be revocable within the meaning of section 16(1)(c) of the Indian Income-tax Act and all income from the trust property must be deemed to be the income of the assessee and taxed as such. The settlor in this case owned valuable immovable properties situate in Calcutta and elsewhere. Being minded to settle these for the benefit of himself, his three sons, one being unmarried, and two daughters-in-law, he executed a deed of trust on August 10, 1949, under which he along with his sons became the trustees. The properties described in the schedule to the deed are the trust properties subject to the conditions laid down in clause (5) of the document. The deed recites that the settlor was possessed of the properties mentioned in the schedule to it as also of the benefit of a mortgage executed by Madhu Sudhan Das Burman and others in his favour for a sum of Rs. 4,30,000 with interest and being desirous of settling the properties including all cash and bank balances belonging to him for the benefit of the persons mentioned, he was executing the deed of trust. As the question involved is one of the proper construction of the document it is necessary to quote the exact language of it so far as the relevant portions are concerned. They are as follows :

"Now this indenture witnesseth that... in consideration of the natural love and affection which the settlor has and bears for his sons... and his daughters-in-law... he, the settlor both hereby grant, transfer, convey, assign and assure unto the trustees all these

messuages, lands, hereditaments and premises Nos. 7, Hastings Street, 64/1, Ritchie Road, 6, Dovar Road, 10, Dovar Road, 15 & 15/1, Harish Chatterjee Street, subject to the condition of clause 5 hereof and a strip of land being the unsold portion of 39 & 39/1, Beltola Road, and three buildings at Puri and two houses at Darjeeling... and the balance of the principal sum of the said mortgage moneys with all interest and all money and cash balance as aforesaid... to have and to hold the said messuages, lands, hereditaments, and premises herein mentioned or intended so to be subject to the condition of clause 5 hereof and moneys advanced on mortgage and lying at credit in various banks unto the trustees upon the trusts for the purposes and subject to the powers, provisions and agreements hereinafter declared and contained concerning the same and the settlor hereby declares that the trustee or trustees for the time being shall stand possessed of all the said several messuages, lands, hereditaments and premises herein mentioned subject to the condition of clause 5 hereof and all moneys advanced on mortgage, cash balance and other moneys and all other properties whatsoever which the settlor is not possessed of whether described in the said schedule or not hereinafter collectively called the trust properties...

Clauses 1. - To collect the rents, issues and profits of the trust properties and to receive and collect the interest of the moneys advanced on mortgage as well as the principal thereof, and out of the monthly collections and receipts, firstly, to set apart 33 1/3% of the annual collections or a sufficient sum each and every month as the trustees or trustee for the time being shall consider necessary to meet the municipal taxes, and for repairs of the immovable properties belonging to the trust under these presents and also to meet the income-taxes or other taxes or impositions which may be payable annually or otherwise in respect of the trust properties and to pay at the first instance the sum of Rs. 400 per month out of the balance income to the settlor during the term of his natural life and the rest and residue to the said Dharendra Mullick, Robindra Mullick and Purnendro Mullick in equal shares. After the demise of the settlor, the trustees or the trustee shall pay the said balance of income to the said Dharendra Mullick, Robindra Mullick and Purnendro Mullick in equal shares and if they or any of them are dead, then to the heirs or heir of them or any one of them absolutely after such heirs or heir has or have attained the age of 18 years.

Clause 5. - The trustees or trustee for the time being shall out of the trust properties pay to the settlor a sum of Rs. 60,000 either in lump or instalments. If the trustees or trustee for the time being pay the said sum of Rs. 60,000 as aforesaid within 12 months from the date hereof, the premises Nos. 15 and 15/1, Harish Chatterjee Street, will revert to the trust, otherwise the settlor may sell the said premises and for the deficit, if any, the trust properties shall be charged.

Clause 10. - The trustees or trustee for the time being shall have the power to raise a loan to the extent of Rs. 50,000 only on such terms and rate of interest as the trustees or the trustee for the time being shall consider necessary on the mortgage of any of the properties for the time being belonging to the trust, created by these presents for the purpose of constructing a building on the said premises No. 64/1, Ritchie Road, and/or premises No. 10, Dovar Road, and/or premises No. 7, Hastings Street, and/or premises Nos. 15 and 15/1, Harish Chatterjee Street, Calcutta, provided always mortgagee or mortgagees shall not be bound to see to the application of the money so raised on mortgage.

Clause 12. - The trustees or trustee for the time being shall have power during the life time of the settlor with his consent and thereafter at their or his absolute discretion to invest out of the trust properties sum or sums to the extent of Rs. 25,000 in the mortgage of immovable property or properties or in such business or businesses as he or they shall think fit. The interest or the profits as the case may be derived out of the said mortgage or business or businesses shall after meeting all expenses and outgoings be divided equally between the trustees. But the corpus, viz., Rs. 25,000, shall be invested for the purpose of purchasing immovable property or properties or trust stocks or securities and shall form part of the trust created by these presents.

Clause 13. - By an agreement dated 26th November, 1947, made between the settlor and one Rash Behari Banerji, the settlor has entered into an agreement to advance a sum of Rs. 25,000 only to the said Rash Behari Banerji for the purpose of conducting testamentary proceedings and/or litigation in the honble High Court at Calcutta (in the goods of Raja Sarat Chandra Rai Choudhury deceased of Chanchal in the District of Halda) being testamentary suit NO. 1 of 1947 (Kali Kumar Chatterji v. Rash Behari Banerjee and Ors.) in consideration of getting out of the said estate, if the said suit is won by or if some terms of settlement are concluded with or if the said suit is disposed of in favour of said Rash Behari Banerjee a sum of Rs. 1,25,000 only being four times the said sums of Rs. 25,000 as and by way of remuneration plus the said principal sum of Rs. 25,000. Pursuant to the said agreement, the settlor has already paid to the said Rash Behari Banerji a sum of Rs. 20,000 and the balance of Rs. 5,000 still remains unpaid. The trustees or the trustee for the time being shall have power to pay the said balance of Rs. 5,000 to Rash Behari Banerji when called upon to do so and in case the said suit is won or some terms of settlement are concluded with or the said suit is disposed of in favour of the said Rash Behari Banerji the said principal sum of Rs. 25,000 with an additional sum of Rs. 60,000 by way of profits will be refunded to the trust estate and the rest and residue shall be taken absolutely by the settlor."

As it is necessary to examine the above provisions of the trust deed in the light of section 16(1)(c) of the Indian Income-tax Act, it is necessary to set out the relevant provisions thereof as follows :

"All income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor :

Provided that for the purposes of this clause a settlement, disposition or transfer shall be deemed to be revocable if it contains any provision for the retransfer directly or indirectly of the income or assets to the settlor, disponent or transferor, or in any way gives the settlor, disponent, or transferor a right to reassume power directly or indirectly over the income or assets :

Provided further that the expression `settlement or disposition shall for the purposes of this clause include any disposition, trust, covenant, agreement or arrangement, and the expression `settlor or disponent in relation to a settlement or disposition shall include any person by whom the settlement or disposition was made :

Provided further that the clause shall not apply to any income arising to any person by virtue of a settlement or disposition which is not revocable for a period exceeding six years or during the lifetime of the person and from which income the settlor or disponent derives no direct or indirect benefit but that the settlor shall be liable to be assessed on the said income as and when the power to revoke arises to him."

Leaving out of account the provisos it would appear that the section was aimed at charging in the hands of the transferor all income arising under a settlement to "any person" be he the transferor or not, if the transfer was a revocable one. The word "revocable" has been given a special meaning by the first proviso which is divisible into two parts. By the operation of the first part a settlement or transfer is to be treated as revocable if there be any provision in it for a direct or indirect retransfer of the income or the assets to the settlor. In other words it means that if the income of the properties, the subject-matter of the settlement accrues to some third person, but there is a provision for the same being made over to the settlor either directly or got at by him in any manner indirectly the settlement comes within the mischief of the section. The same result is to follow if the assets are first transferred to somebody with a provision for the settlor being able to get the same back again by any direct or indirect means. The second part of the proviso is aimed at preventing a transferor from being able to exercise a right over the income or the assets which he would have had but for the transfer. In substance the effect of the whole proviso is that to be out of the mischief of the section the settlor must divest himself from the income of the subject-matter of the trust or the beneficial enjoyment of the ownership thereof unreservedly. The

Second proviso define what is a settlement or disposition and who is a settlor or disponent for the purpose of the section. The third proviso is a rider not only to the main section but also to the first proviso to it. But for the third proviso a settlement or disposition containing for the provision for retransfer of even a small fraction of the income to the settlor would render the whole income of the settlement chargeable in his hands. This proviso is aimed at ameliorating that situation by providing that the portion of the income from the trust properties which is settled on a third person is to be assessed in his hands if the settlor does not retain any power to deflect the same for a period exceeding six years or during the lifetime of the donee; provided, however, that if by the settlement such deflection was possible after the period of six years or after the lifetime of the donee the settlor would then become again assessable thereon. The third proviso also goes to show that the settlement as a whole does not come within the mischief of the section if the revocability attaches only to a part of the income. It is further to be noted that the proviso does not touch a provision for retransfer of any part of the assets to the settlor or a right of the assessee to reassume power over the same within the meaning of the first proviso. Consequently, if the settlement enables the settlor to get a retransfer of the assets or to reassume power over the same after the date of the transfer the whole settlement become revocable and the settlor becomes assessable in respect of the whole income. The relevant provisions of the English statutes are not in pari materia with the above provisions : consequently, an examination of the English authorities will hardly be helpful in finding out the real import of the Indian statutory provisions. The notable decisions on section 16(1)(c) cited at the bar were the cases of *Ramji Keshavji v. Commissioner of Income-tax*<sup>1</sup> and *Commissioner of Income-tax v. Kikabhai Premchand*<sup>2</sup> In the first of these cases there was a consent decree in a partition suit between the members of a Hindu family consisting of the assessee, his sons, daughters and his wife. By the decree all the properties in the possession of the assessee were declared to be his self-acquired properties and it was agreed between the parties that a trust deed should be executed in respect of a house property in Bombay in terms of a draft agreement annexed thereto. The wife of the assessee was to be paid the net income of the property. A deed of trust was executed in due course by which all the right, title and interest of the assessee in the said premises were disposed of reserving to him the right to occupy during his life time a portion of the property which was already in his occupation. The deed provided that the trustees should collect the rents etc. and after meeting the necessary charges of collection and insurance premium, pay over the balance of the income to the wife for her life subject to the obligation on her part to maintain thereout the minor children so long as they resided with her. In case of the wife predeceasing the assessee the trustees were to pay from and after her death the balance of the income to the settlor for his lifetime. In case of the assessee or his childrens protracted illness the wife could apply to the trustees for payment of moneys to her to meet the medical expenses. The income tax authorities sought to include the income from the property in the total income of the assessee who, however, claimed protection

under the third proviso to section 16(1)(c). Kania and Chagla JJ. were unanimous in holding that the last-mentioned provision in the trust deed did not amount to one for retransfer of the assets or income or resumption of power directly or indirectly to the assessee within the meaning of the first proviso to section 16(1)(c). With regard to the retention of the use of a portion of the property by the assessee, Kania J. said that it was not a retransfer or reassumption of the power contemplated by the first proviso. He observed however that "the words `retransfer or reassume necessarily involve a second transaction of a later time." He repelled the argument of the revenue department that the provision for payment of the income to the assessee after the death of his wife amounted to a retransfer directly or indirectly of the said income or in any even reassumption of the power over the income or assets. He stated : "... the question is whether a contingent claim which may arise under a settlement, is covered by the proviso. Speaking for myself, I should very much hesitate before accepting this contention of Commissioner which imports into the proviso words which are not there. The settlor does not get a retransfer of the income or assets or a reassumption of power over the income or assets by reason of the proviso alone. He gets it by reason of the proviso, coupled with a contingency, which may or may not happen. It is only on the occurrence of the contingency that he acquires the right, and it appears arguable that this proviso does to cover such a case." Chagla J. agreed with the conclusions of Kania J., but took a different view with regard to the contingent claim of the assessee to the income after the death of his wife. He said : "... the words of the section are wide enough to cover even a provision for retransfer which is contingent in its nature. Proviso (1) to the section, when it refers to any provision, does not in any way qualify the nature or the character of the provision. If we find in the trust deed that there is a provision for retransfer, to my mind the proviso would apply whether the nature of the provision is that it postpones the retransfer on a contingency happening or it provides for the retransfer on a certain event happening." The learned judge went on to consider the relation between the first proviso and the third proviso and observed : "In my opinion sub-clause (c) of section 16(1) refers to all revocable transfers -transfers which are revocable in fact - transfer in which there is a provision for revocation on the part of the settlor. The proviso (1) then extends the definition of a revocable transfer and it provides that where in a deed of transfer there is a provision for retransfer directly or indirectly of the income of the assets to the settlor, or where such a deed in any way gives the settlor the right to reassume power directly or indirectly over the income or assets, such a deed must be deemed to be revocable transfer. Whereas proviso (1) extends the definition of revocable transfer, proviso (3) contains a limitation - a limitation of time which applies both to revocable transfers under the substantive provision of the sub-clause (c) and also those which are deemed to revocable transfers within the meaning of proviso (1). What proviso (3) lays down is that when you have a deed which is not revocable for a period exceeding six years or during the lifetime of the person who is beneficiary and for whose benefit the property is settled, then such a deed does not come within the operation

of sub-clause (c) of section 16(1), provided the other conditions, with which I need not deal at present, are also satisfied.... If you take a deed which is deemed to be revocable within the meaning of proviso (1), then if the provision for retransfer or the right to reassume power does not come into operation till after the period which exceeds six years or beyond the lifetime of the persons benefited, then also proviso (3) applies."Both the learned judges were of the opinion that the proviso (3) applied not only to the substantive provisions of sub-clause(c) but also to the first proviso thereto. With respect, I agree with the conclusions of Chagla J. I find myself unable to hold that a contingent claim which may arise under a settlement is not covered by the first proviso to the section as held by Kania J. Again I cannot see why it should be necessary to have a second transaction of a latter time to satisfy the requirements of the said proviso if that is what his Lordship meant by observations which I have quoted above. The deed of transfer or settlement may itself provide that a person other than the settlor should get the income or assets with direction for transfer of the same in certain events or after a certain date. Such a direction to my mind would be a provision for retransfer within the meaning of the proviso and no independent deed or document of a subsequent date may be necessary to effect a retransfer.

In Commissioner of Income-tax v. Kikabhai Premchand [[1948] 16 I.T.R. 207.](Suopra), the question which engaged the attention of the court was whether it was necessary for the assessee to have an actual interest in the income or assets transferred to be within the mischief of the section. Here the assessee had settled a sum of rupees one lakh upon a trust for the purpose of establishing and equipping a sanatorium for the benefit of deserving and needy persons, with himself as the sole managing trustee for life although there were to be other trustees. By various clauses in the trust deed he had the right to retain the trust securities in his name, to operate the banking account of the trust fund without even the other trustees having a right to examine the same and to be entitled to sell the trust properties and become their purchaser. The trust was, however, declared to be irrevocable for a period of six years and three months and to become revocable thereafter with the consent of the trustees. With regard to the settlors power to purchase the trust property, the learned judges held that although it was forbidden by section 53 of the Trusts Act one could not overlook the fact that the settlor had taken to himself such a power in derogation of the law. Again, with regard to the power of the settlor to give loans of moneys to himself it was observed that it would be competent to the settlor to make such a loan without any security but even without interest. The contention of the assessee that for the settlement to be revocable his interest whether direct or indirect had to be an actual interest was repelled by the learned judges. Chagla C.J. observed : "The whole object of the third proviso is to consider a revocable trust irrevocable provided that the settlor enjoys no benefit whatever in the income of the trust for a period exceeding six years.... If... he does retain any benefit in the enjoyment of the income, then even during these six years the trust does not become irrevocable and the third proviso does not apply..... The proper construction of the trust deed cannot depend upon what

the settlor actually does or what he refrains from doing. It can only depend upon the court coming to the conclusion that as the trust deed stands he is entitled to certain benefits whether they are direct or indirect in nature..." In the result it was held that the income of the trust was subject of tax in the hands of the settlor. The arguments of Mr. Meyer on the several provisions of the trust deed set out above may be summarised as follows :

(a) Clause 1 provides that the trustees must pay the settlor Rs. 400 per month out of the balance income which accrues to them after setting apart  $33\frac{1}{3}$  per cent. of the annual collection or a sufficient portion thereof to meet the municipal taxes, repair charges, etc., and this is a provision for retransfer of a part of the income within the meaning of the first proviso.

(b) Clause 5 contains a provision for Rs. 60,000 being paid to the settlor either out of income of the property or the assets transferred and as such is within the mischief of the first proviso. Even if it be assumed that under the operative part of the deed premises Nos. 15 and 15/1, Harish Chatterjee Street, Calcutta, were transferred subject to the condition of this clause the settlor could sell not only the said two properties in case of default of payment of Rs. 60,000 within 18 months but could proceed against the other trust properties as if they had been charged in his favour for the payment of this sum. According to Mr. Meyer this gave the settlor a right to reassume power over the assets.

(c) Under clause 10 it was open to the trustees to mortgage any portion of the trust property other than 15 and 15/1, Harish Chatterjee Street, Calcutta, for raising Rs. 50,000 and spend the same for constructing a building on these two properties. If this were done, and under the powers given by clause 15 this could easily be achieved, the settlor could sell Nos. 15 and 15/1, Harish Chatterjee Street, Calcutta, with the new building erected thereon in case of default in payment of the sum secured by clause (5). The loss so caused to the trust estate resulted in proportionate benefit to the settlor within the mischief of the first proviso.

(d) Under the clause 12 the trustees could lay out Rs. 25,000 on the mortgage of immovable property or in any business and the provision for the division of income therefrom among the trustees including the settlor was one for retransfer of a part of the income to him.

(e) By clause 15 the settlor was transferring his liability to advance Rs. 5,000 to Rash Behari Banerji but not parting with all the benefits which might accrue to him under the champertous agreement. If the testamentary proceedings or the litigation mentioned in the said clause did not terminate in favour of Rash Behari Banerji the trust estate would lose the advance of Rs. 5,000 without any compensatory benefit and if the result of the litigation was favourable to Rash Behari the trust estate would have to share the profits receivable under the agreement with the settlor and in that case the clause would amount to a provision for retransfer of a part of the assets to the

settlor. It was argued on behalf of the revenue that the clauses 1, 5, 10, 12, and 15 fell within the mischief of the first proviso to the section whereby the settlement became a revocable one attracting the chargeability of the entire income of the trust properties in the hands of the settlor. Dr. Pal appearing on behalf of the assessee relied on the observation of Kania J. in Ramji Keshavjis case [[1945] 13 I.T.R. 105.] and argued that so long as there was no second transaction later in point of time than the deed of transfer, the settlement would not attract the operation of the first proviso. He further contended that the proper construction of clause (1) should be to treat the transfer to the trustees as subject to the payment of Rs. 400 per month out of the income to the assessee. In other words, the trustees had only the right to receive the income less Rs. 400 per month. He relied on the Ramji Keshavjis case [[1945] 13 I.T.R. 105.](Supra) again, where the transfer of the property subject to his right of occupancy was held to be without the mischief of the first proviso and referred to the case of *H. R. Munro v. Commissioner of Stamp Duties*<sup>3</sup> to show that it was possible to transfer a property minus a particular right. In the last-mentioned case a father and his children had entered into an oral agreement to carry on the business of graziers in partnership. The pasture land originally belonged to the father who some years afterwards transferred by way of gift to each of the four sons and his two daughters his right, title and interest in portions of his holding of land. All these transfers were taken subject to an agreement and on the understanding that if any member of the family were desirous of so doing he could withdraw from the agreement as to the running of stock in which the partnership was interested on his holding and work his property with own stock provided a reasonable time was allowed for the removal therefrom of the stock in which the partnership was interested. The Judicial Committee came to the conclusion that "... what was comprised in the gift was, in the case of each of the gifts to the children and the trustees, the property shorn of the right which belonged to the partnership..." There can be no doubt that the property may be transferred to trustees subject to certain exceptions by the use of suitable words. I cannot, however, hold that such a result had been achieved in this case. By the trust deed in question the settlor did not give the properties to the trustees subject to payment of Rs. 400 per month to him. Subject to the condition in clause (5), which I shall deal with presently, the settlor clearly disposed of the entire properties mentioned in the schedule to the deed in favour of the trustees who became entitled to collect the entire income therefrom. Clause (1) only contains directions with regard to the disposal of the income including one for payment of Rs. 400 per month to the assessee. It was argued that even if the court comes to the conclusion that there was a provision for retransfer of a part of the income, viz., Rs. 400 per month to the settlor, this should only make the said monthly payment of Rs. 400 as assessable in the hands of the assessee and not the entire income of the trust property. Reference was made to the third proviso to section 16(1)(c) and it was argued that this went to show that the portions of the income might be settled on different persons and the settlor might have a direct or indirect interest in some of them, but not in others, and the

assessability of the settlor could only arise with respect to the portion of the income in which he was found to have a direct or indirect interest without affecting chargeability of the other portions of the income to others where no question of revocability arose.

In my view the substance of the contention of Dr. Pal with regard to the effect of clause (1) must be accepted and it must be held that under this clause only Rs. 400 payable to the settlor per month became assessable in his hands. The construction of clause (5), however, is not free from difficulty. The operative portion of the deed of settlement shows that only premises numbered 15 and 15/1, Harish Chatterjee Street, were to be subject to the condition of this clause but according to the habendum clause all the properties appears to have been transferred subject to that condition. Clause (5), however, appears to show that the settlors intention was that on payment of Rs. 60,000 by the trustees premises No. 15 and 15/1, Harish Chatterjee Street, were to be freed from the condition. But even taking the view most favourably to the settlor, namely, that the entire properties were conveyed to the trustees subject to the clause(5), it seems to me that the settlor made a provision for reassumption of power over the assets in case of failure of payment of the sum secured. It is not possible to hold that the properties were transferred to the trustees shorn of the right reserved by clause (5). If properties are settled upon trust, but subject to the payment of a specified sum, which may be realised by sale of some of the properties some of the properties and with a charge in favour of the settlor with the contingent right to follow all the properties and put them up to sale and this, in view, gives him a right to reassume power directly or indirectly over the assets. Dr. Pal further argued that to treat the whole settlement as revocable because the settlor could reassume power over a small portion of the assets would not be reasonable construction of the statute. He contended that the reasonable construction should be to treat the income as chargeable in the hands of the transferee so long as the power of revocation was not exercised. I find myself unable to accede to this contention. There is nothing in the section to indicate this and but for the third proviso revocability even with regard to part of the income would render the whole settlement revocable. There is no such saving clause with regard to the contingency of the settlors reassuming power over a small portion of the assets and the section must come into full force and effect in case of such contingency. In this connection one must bear in mind the dictum of the Supreme Court that the enactment of section 16 was designed to overtake and circumvent a growing tendency on the part of taxpayers to endeavour to avoid or reduce tax liability by means of settlements and to provide against the disposal by the taxpayer of part of his property in such a way that the income should no longer be receivable by him, while at the same time he retained certain powers over, or interest in, the property or its income : see *Tulsidas Kilachand v. Commissioner of Income-tax* <sup>4</sup>As already pointed out the third proviso is aimed at giving relief to the settlor when there is a provision for retransfer of a part only of the income in his favour. As there is no corresponding provision to cover the case of retransfer of a part of the assets, it appears to me that a clause to the latter effect would make the

whole settlement a tainted one making it revocable in its entirety. Very much the same observations apply to the provision contained in clause(10) of the deed of settlement. Under the clause, as argued by Mr. Meyer, it would be open to the settlor to raise money on the mortgage of properties other than those on Harish Chatterjee Street and sell the last mentioned properties in case of default of payment of Rs. 60,000 secured by clause (5). By this device the settlor could reassume power over the assets other than the Harish Chatterjee Street properties. Under Clause (12) it would be open to the trustees to mortgage immovable property covered by the settlement to raise Rs. 25,000 and distribute the net income from the investment among the trustees including the settlor. This would, however, give him only a right to a part of the income from the said fund making it chargeable in his hands under the third proviso and would not attract the operation of section 16(1)(c) with regard to the entire settlement. By clause (13) the settlor was transferring his liability with regard to advance of Rs. 5,000 to Rash Behari Banerjee. It should be noted that there was no novation of the agreement with Rash Behari Banerjee. The settlor alone was under an obligation to advance the balance of Rs. 5,000 and in case of successful termination of the litigation to be entitled to the fruits thereof. By clause (13) the settlor had only provided that by the advance of Rs. 5,000 the trust estate should not only benefit by the amount of that advance with interest but reap a substantial profit. If the result of the litigation was unfavourable to Rash Behari the trust estate would certainly lose Rs. 5,000 without any corresponding benefit. I cannot find in this clause any provision for retransfer of the income or assets of the subject-matter of the trust in favour of the settlor. In the result the question referred, namely, "Whether on the facts and in the circumstances and on a proper construction of the trust deed dated August 16, 1949, the whole income of the trust fell within the ambit of section 16(1)(c) of the Indian Income-tax Act ?", must be answered in the affirmative and against the assessee. The assessee must pay the costs of this reference.

**RAY J. - I agree.**

Question answered in the affirmative.

Cases Referred.

1[1945] 13 I.T.R. 105

2[1948] 16 I.T.R. 207

3[1934] A.C. 61; 2 E.D.C. 462

4[1961] 42 I.T.R. 1; [1961] 3 S.C.R. 351